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NO. 92-808

In the Supreme Court of the United States

OCTOBER TERM, 1992

LORENZA HOLMES KNIGHT,
Petitioner,

versus

CITY OF NEW ORLEANS AND
WARREN G. WOODFORK
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the recording of telephone conversations made to the command desk of the New Orleans Police Department, involving exclusively police business, is within the "business exception" contained in 18 U.S.C. § 2510 (5) (a) (ii).

2. Whether the petitioner received sufficient notice and an adequate hearing before his separation from employment to satisfy the requirements of procedural due process.

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

1. Lorenza Holmes Knight, petitioner

2. City of New Orleans, respondent

3. Warren G. Woodfork, respondent

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STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition In Courts Below

Plaintiff[1] brought this suit against defendants on August 2, 1989. The complaint alleged a cause of action under the civil action section of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, (18 U.S.C. §2520) that provides relief for any person whose wire, oral, or electronic communication is intercepted, disclosed or intentionally used in violation of Title III. Plaintiff amended his complaint on August 30, 1989. The amended complaint alleged a cause of action under Title VII of the Civil Rights Act of 1964 (42 U. S. C. §2000(e)) for unlawful job discrimination on the basis of race. Plaintiff again amended his complaint on November 9, 1989. The second amended complaint alleged a cause of action under the Civil Rights Act of 1866 (42 U.S.C. §1983) for deprivation of a liberty interest without procedural due process of law.

On September 4, 1990, defendants filed a motion to dismiss plaintiff's Title VII claim based upon plaintiff's failure to file a charge with the Equal Employment Opportunity Commission within the statutorily mandated time limitations. While the District Court had defendants' motion to dismiss under submission, both plaintiff and defendants filed partial summary judgment motions regarding the wire-tapping claims.

The District Court granted both of defendants' motions, and entered a judgment on July 1, 1991 ordering

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[1] For purposes of this brief, Petitioner Knight will be referred to as "Plaintiff" and Respondents City of New Orleans and Warren G. Woodfork as "Defendants."

plaintiff's Title VII and wire-tapping causes of action dismissed. (Appendix A to Plaintiff's Petition for Writ of Certiorari (Plaintiff's Petition)). In the order of dismissal, the district court additionally ordered plaintiff to file a brief particularizing his remaining claim for denial of procedural due process. The district court also gave defendants a deadline to file a motion for summary judgment regarding plaintiff's remaining claims.

On August 19, 1991 defendants filed a motion for summary judgment regarding plaintiff's remaining claim under 42 U.S.C. § 1983. On October 24, 1991, the district court granted defendants' motion for summary judgment and entered a judgment dismissing plaintiff's remaining claims in their entirety. (Appendix B to Plaintiff's Petition). The Fifth Circuit Court of Appeals affirmed the district court's judgment in a per curiam opinion. (Appendix C of Plaintiff's Petition).

B. Statement of Facts

Plaintiff is a former employee of the City of New Orleans ("City") employed with the New Orleans Police Department ("NOPD") from 1964 until November 1988. His employment included the position of commander in the NOPD Communications Division during 1977. In 1986 plaintiff became a field supervisor. This position's duties included acting as superintendent of the NOPD at times when Superintendent Woodfork was off duty.

Plaintiff worked as a field supervisor on August 6, 1988. While working in the field, plaintiff received a page from Police Officer John Reilly, originating from the Communications Division command desk of the NOPD. In response to the page plaintiff left his car and called Reilly from a public telephone booth at approximately 11:00 p.m.

The conversation between the plaintiff and Reilly concerned an incident involving a police officer from the Fifth District, Cathy Carter. The telephone conversation concerned strictly police business. Plaintiff and Reilly had the following conversation.

Knight	-	Who's in 527
Reilly	-	Cathy Carter
Knight	-	Black?
Reilly	-	Yes, She's not usually like that...
Knight	-	They are usually like that, John it's a fucking nigger
Reilly	-	Uh huh
Knight	-	It's a shame to say it but a fucking nigger is a nigger and ain't worth a shit, you know.

The conversation continued,

Knight	-	I want paper work typed up on it explaining in detail exactly what she did and we'll send it down to the district in the form of a complaint.
Reilly	-	Okay
Knight	-	The bitch is not going to get away with this kind of stuff, you know, I don't give... I'm tired of these fucking niggers.

The NOPD taped the telephone line and recorded the conversation because all telephone instruments are taped in the communications operation and command desk with the exception of a telephone made available for personal telephone calls. The NOPD's recording system is utilized to preserve and accurately recall messages pertaining to emergencies or to other official police business including departmental and personnel investigations. All personnel of the NOPD know that the communications lines are tapped as a matter of common knowledge, and all personnel who work in the communications division are informed that the lines are tapped.

The NOPD became aware of the plaintiff's racial comments contained on the tape from an investigation conducted by Sergeant Melvin Howard of the NOPD's Fifth District. As Police Officer Cathy Carter's platoon commander, Howard's responsibilities included investigating a charge of misconduct against Carter. Part of his investigation included reviewing recorded radio and telephone conversations between Carter and the police dispatcher. While listening for a taped communication between Carter and the police dispatcher, Howard came upon the above-described telephone conversation between the plaintiff and Reilly. Howard made a cassette recording of the conversation that ultimately reached the desk of Superintendent Woodfork. After hearing the tape, Woodfork ordered the NOPD Internal Affairs Division ("IAD") to determine whether the plaintiff had made the statements contained on the tape. Major Gerald Salles, the commander of IAD, directed his subordinate Sergeant Mason Spong to return to communications and make another copy of the conversation. A transcript of the taped converstation was made by Salles secretary.

Salles contacted Knight to inform him that Wood-

fork had heard the tape and wanted the plaintiff to give a statement. Approximately two days later the plaintiff and Salles met on September 6, 1988 to record a sworn statement. First, plaintiff listened to the recorded statement and then admitted that he had made the statements on the tape. When asked by Salles for reasons for making the statements Knight read into the record a prepared statement.

After reviewing the transcript of plaintiff's statement and plaintiff's admissions, Woodfork ordered a formal investigation of the plaintiff because of the racial comments made on the recorded police line. At the conclusion of Major Salles' investigation, the defendants contacted plaintiff by letters dated September 14, 1988 and October 20, 1988 and charged him with violations of NOPD rules and procedures resulting from the comments contained in the taped conversation. The October 20th letter instructed plaintiff to appear for a disciplinary hearing before Woodfork on November 7, 1988.

The disciplinary hearing occurred, as scheduled, on November 7, 1988. Defendants tape recorded and later transcribed the entire hearing. Plaintiff appeared represented by counsel. During the hearing, Superintendent Woodfork told plaintiff the results of the investigation and the changes that arose from the investigation. In response, plaintiff again read a prepared statement to defend against the charges. After plaintiff completed reading his statement Woodfork and plaintiff discussed the charges further. Plaintiff's attorney made a brief statement. Woodfork then concluded the hearing.

By letter dated November 15, 1988 Woodfork informed plaintiff of his decision to involuntarily retire plaintiff for violation of Rule 6 para. 3-Public Statements and

Appearances and Rule 2 para. 4-Discrimination. Plaintiff appealed the Superintendent's decision to the New Orleans Civil Service Commission, who in turn dismissed plaintiff's appeal upholding the Superintendent's decision.

SUMMARY OF THE ARGUMENT

Plaintiff failed to show any special or important reason why this Court should grant his Petition. He merely argues that the district court and Fifth Circuit holdings were wrong. This assertion is insufficient to merit the granting of a writ of certiorari.

In any event, the holding of the district court and Fifth Circuit were correct. The New Orleans Police Department has the authority to record telephone conversations involving police business between their employees for use in internal investigations of police misconduct. The courts below found that plaintiff's recorded telephone conversation involved police business, and that defendants lawfully used the recording as part of an internal police personnel investigation. Thus, defendant's actions fell within the business exception to Title III found at 18 U.S.C. § 2510 (5) (a) (ii).

Regarding plaintiff's procedural due process claim, the lower courts correctly found that plaintiff received sufficient notice and an adequate hearing before his involuntary retirement. The transcripts of plaintiff's initial affairs interview and the pre-termination hearing before Superintendent Woodfork establish that plaintiff knew what he did wrong and why defendants disciplined him. Further, plaintiff had every opportunity to defend his actions during his pre-termination hearing, and guard against factual mistakes.

Summary judgment is appropriate since plaintiff, the party opposing the motion, cannot establish a prima facie case either under Title III, or under 42 U.S.C. § 1983.

ARGUMENT

A. Plaintiff's Petition Does Not Present Any of the Requisite Factors Which the Court Considers in Granting a Petition for Writ of Certiorari

The Supreme Court grants a Petition for Writ of Certiorari when the case presents "special or important reasons" for granting of the writ. Sup.Ct.R. 10.1. None of the considerations that weigh in favor of granting a writ are present in the instant case: 1) Plaintiff does not cite to any cases where the district courts or courts of appeal are in conflict;[2] 2) the Fifth Circuit did not depart from the accepted and usual course of judicial proceedings, nor did it sanction such a departure by the district court; and 3) nothing in this case presents an important, new decision of federal law meriting Supreme Court review.

This case presents an unremarkable procedural due process claim coupled with a frivolous federal wire tap allegation. Plaintiff fails to point out anything exceptional about the holding below. In fact, Plaintiff does not even attempt to demonstrate why any of the factors in Sup.Ct.R. 10.1 should apply to this case, but merely asserts that the district court and Fifth Circuit reached the wrong decision. Even if that assertion were true, it would not be sufficient to invoke this Court's review, absent one of the factors listed in Sup.Ct.R. 10.1 or other extraordinary circumstances that are not present here.

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[2] Under Sup.Ct.R. 10.1, the Court will consider exercising its discretionary review if the decisions of two circuit courts are in conflict, something which Plaintiff does not even contend.

B. The District Court Properly Granted Summary Judgment as to Plaintiff's Wire-Tapping Claim under 18 U.S.C. § 2520, and the Fifth Circuit Properly Affirmed the District Court's Holding.

Plaintiff argues that the lower courts erred by failing to consider the Louisiana wire-tapping statute, La. R.S. 15:1301, before concluding that plaintiff made his telephone conversation in the ordinary course of business. Plaintiff maintains that Louisiana law prohibits the conduct that the lower courts ruled valid. Defendants maintain that the lower courts applied the correct law. Second, even assuming state law applies, the state statute relied upon by plaintiff mirrors the federal statute regarding the "business exception." See La. R.S. 15:1302 (a) (ii). Accordingly, the district court correctly granted the defendants summary judgment dismissing plaintiff's claim under 18 U.S.C. § 2520.

C. The District Court Properly Granted Summary Judgment as to Plaintiff's Procedural Due Process Claims under the Fourteenth Amendment, and the Fifth Circuit Properly Affirmed the District Court's Holding.

Plaintiff argues that defendants did not provide sufficient notice of the charge of discrimination until the date of his discharge, and did not give him an adequate hearing to clear his name or the opportunity to refute the charge of discrimination. Defendants maintain that the district court correctly ruled that plaintiff in his pre-termination hearing had an adequate forum to preserve or regain his reputation as well as his job.

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L.Ed 2d 494 (1985), the Supreme Court defined the minimum procedures due prior

to the discharge of a tenured public employee. According to the Court, a pre-termination hearing should be held. This hearing need not be elaborate, and it may be something less than a full evidentiary hearing, in which the employee is entitled to a full administrative hearing and judicial review. In essence, this pre-termination hearing should be an initial inquiry whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. The purpose of the pre-termination hearing is not to definitively resolve the propriety of the discharge, but to guard against mistaken decisions.

The pre-termination hearing does not contemplate a neutral arbiter of the dispute. As discussed in *Duchesne v. Williams*, 849 F.2d 1004 (6th Cir. 1988), the pre-termination hearing merely allows the employee a "right-of-reply" to the charges against him to guard against mistaken assumptions by the employer. Any alleged bias on the part of the employer conducting the hearing is considered during the post termination hearing.

The record establishes that Superintendent Woodfork's actions during the investigation of plaintiff were consistent with the requirements set forth in *Loudermill*. From the outset of the investigation, plaintiff had notice of the charges. As reflected in the transcript of the September 6, 1988 statement taken by Major Salles, Plaintiff knew the reasons for his investigation.

> Q. I would like to bring to your attention on August 6, 1988, you had a conversation with Police Officer John Reilly, assigned to the Command Desk in the Central Complaint Bureau. Prior to that, Officer Reilly had paged you on your beeper to give him a call. That conversation was recorded and at this time I would like to stop this tape

momentarily and allow you to hear the conversation you and Officer Reilly had so you will know what we are talking about. The tape is now being stopped and it is 11:06 a.m. We are now returning back to the tape and the time is 11:14 a.m. Captain Knight has had the opportunity to listen to the recording of a conversation between himself and John Reilly. In that conversation involved Officer Reilly explaining to Captain Knight, Police Officer Cathy Carter, assigned to Car 527, and her failure, refusal to handle a call to which she was dispatched to, her subsequent being ordered to handle that call and again refusing to handle it and in fact leaving and going home instead of handling the call. During the conversation Captain Knight asked if the individual was black and he stated... Reilly said yes, but that was not like her to be that way and Captain Knight replied, yes they are that way because she was a fucking nigger and they all get that way. And then replied a fucking nigger ain't shit and that he's tired of these niggers. Captain Knight, do you recall this conversation?

A. I recall having a conversation with Officer Reilly. I was not aware of exactly what I said until you played the tape recorder for me.

Q. Do you admit that this is your voice on the tape and that you did in fact say this statement?

A. Yes.

Q. Do you have any comments you'd like to make relative to the reason you made this statement, etc.?

A. Yes, I have a prepared statement I'd like to read into the tape.

As reflected in the transcripts of the investigation and pre-termination hearing, plaintiff had notice of the charges against him and the opportunity to respond to the charges during a pre-termination hearing. Accordingly, the district court correctly granted the defendants a summary judgment dismissing plaintiff's claim under 42 U.S.C. 1983.

CONCLUSION

Plaintiff has not shown any "special or important reasons" why a writ of certiorari should be granted in this case. Sup.Ct.R. 10.1. Plaintiff has not alleged (i) any conflict between the circuits, (ii) departure by the Fifth Circuit from the accepted and usual course of judicial proceedings, or (iii) a sanction of such a departure by the district court. Denial of the writ of certiorari will work no injustice in the instant case, since the decisions of the district court and court of appeals are clearly correct under existing law. For these reasons, the Court should deny the Petiton for Writ of Certiorari.

Respectfully submitted,

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